Supreme Court, U.S.
FILED

03 798 NOV 26 2003

No.

In the
Supreme Court of the United States

MELVYN KAUFMAN,

Petitioner,

v.

ANNE FASS, DAVID FASS, HOULIHAN LAWRENCE INC., BURBANK WHITTEMORE INC., and EDGEWATER POINT PROPERTY OWNER'S ASSOCIATION, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution require: (a) that when four judges are selected from a pool of twenty judges to serve on the appellate panel in the court of last resort for the overwhelming majority of appellants in the State of New York, that the selection process be random or neutral ensuring a fair and impartial panel, and that it not be pursuant to closed door maneuvering whereby two clearly biased judges can position themselves onto the appellate panel in four of one appellant's five appeals; and (b) that the process by which judges are selected from a pool of judges to serve on appellate panels be made transparent so that such process cannot be manipulated for improper purposes to deprive appellants of their right to a fair hearing before an impartial court and to maintain the public's faith in the judiciary.

LIST OF PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the decision and order of the Appellate Division of the Supreme Court of the State of New York for the Second Department, dated February 18, 2003.

OPINIONS BELOW

The decision of the Appellate Division of the Supreme Court of the State of New York for the Second Department (the "Second Department"), dated February 18, 2003, affirming the dismissal of the petitioner's complaint, is reported at 302 AD2d 497, 756 NYS2d 247 (2nd Dep't, 2003). (See Appendix A). That decision affirmed the June 28, 2001 decision and order of the Supreme Court of New York for Westchester County, note which has not been reported. (See Appendix D).

The Order of the Second Department, dated April 30, 2003, denying the petitioner's motion for reargument or, in the event reargument was denied, for permission to appeal to the Court of Appeals of the State of New York, note which has not been reported. (See Appendix B).

The Order of the Court of Appeals of the State of New York, dated September 16, 2003, denying petitioner's motion for leave to appeal, is reported at 2003 NY LEXIS 2242. (See Appendix C).

STATEMENT OF JURISDICTION

The order of the Court of Appeals of the State of New York denying petitioner's motion for leave to appeal was entered on September 16, 2003.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides, in relevant part, that:

> nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws

U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

A. Introduction

The most important appellate court in the State of New York, the court which is of last resort for the overwhelming majority of appellants in the State, regularly violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution. This matter involves the acts of that court which did harm to the petitioner by purposely depriving him of his right to a fair hearing before an impartial appellate panel. Instead of randomly selecting judges to sit on appellate panels, the court allowed judges with a prejudice against the petitioner to repeatedly maneuver onto appellate panels considering the petitioner's appeals thereby guaranteeing that the petitioner would lose.

The Appellate Division, Second Department (hereinafter "Second Department"), had twenty members at the time the petitioner's appeal was heard in the instant matter (the Court now has twenty-one judges). All appeals are heard by four or five member panels (it is unknown how it is determined whether to have four or five member panels). There is no statute or regulation or publicized court rule which specifies the manner in which these panels are selected and the process has not been made known to the public. It is apparent from the petitioner's own experience that the selection of Second

Department appellate panels can be manipulated improperly and that judges can choose the appellate panels on which they want to appear.

The petitioner brought an appeal in the instant matter before the Second Department in accordance with his statutory right. The four member appellate panel which heard the petitioner's appeal was not randomly selected. The panel included two justices who have appeared on four of petitioner's five appeals brought to the Second Department in a two year period. The statistical probability of the same two judges out a pool of twenty being randomly selected to appear on four of five appeals brought by a single individual is only 22 out of 1,000,000 or .000022 % chance. Thus, it is evident that the appearance of Justices Krausman and Adams on the appellate panels of four of Mr. Kaufman's five appeals was calculated and not an accident. These judges exhibited extreme bias against the petitioner by making abusive and derisive comments about petitioner and the merits of petitioner's appeals during oral argument. They were also part of the appellate panel which imposed $10,000 sanctions against petitioner merely for refusing to abandon another first time appeal which was properly filed.

The manipulation of the selection of the appellate panels in the petitioner's appeals was done with the full knowledge and consent of the other Justices in the Second Department, as well as with the silent consent of the New York Court of Appeals, the State's highest Court, who sets the rules the Second Department must follow. Thus, it is not merely two rogue judges who are violating the petitioner's Constitutional rights, but the entire New York State Court system which allows such manipulation and abuse to take place.

The instant matter involves only the violence done to the petitioner's Constitutional rights. It is, of course, unfair that a single individual should be required to bear the cost and consequences of improper judicial actions. The petitioner has

been targeted for improper treatment by at least two members of the State judiciary with the actual or tacit consent of the others. It is fortuitous that the petitioner has the ability and fortitude to challenge a State Court system which violates the Constitution. Other appellants may not have the financial resources to do so or they may not be aware of the Constitutional violation.

Meaningful access to an impartial judiciary is a fundamental right of all individuals in the United States. In our Democracy all rights and liberties, including other fundamental rights, are ultimately sustained by resort to the courts and such rights and liberties can not be secured or protected absent a fair hearing before an impartial court. Further, continued faith and trust in the Judiciary require that the selection of judges be totally transparent and not subject to abuse or manipulation. The petitioner requests that this Court rule that access to an impartial judiciary, selected in a transparent manner, is crucial to securing all other fundamental rights and is itself a fundamental right which must be afforded strict scrutiny under our Constitution.

B. Background

The underlying facts are not complicated. The petitioner and the respondents Anne and David Fass each own separate properties on a spit of land in the State of New York known as Edgewater Point which extends into the Long Island Sound on the coast of the Atlantic Ocean. The petitioner and the respondents Fass belong to the Edgewater Point Property Owners' Association (EPPOA), a not-for-profit corporation incorporated in the 1930's to govern the gated community occupying Edgewater Point. All private properties on Edgewater Point are encumbered by restrictive covenants in the deed which ensure that all property owners comply with uniform rules and standards in the community.

The restrictive covenant in issue in the instant matter requires owner occupancy of all houses and prohibits private property owners from doing business or leasing their houses on Edgewater Point. This covenant was intended to ensure that Edgewater Point, unlike the trend for other waterfront communities surrounding New York City in the 1930's, would remain a residential neighborhood of owner occupied houses. By requiring that all houses on Edgewater Point be owner occupied, the covenant also ensures that those individuals actually residing in the community have a financial and personal interest in maintaining both property values and high community standards. Finally, the owner occupancy requirement ensures that property owners will not be subjected to transient neighbors with no personal interest in the community.

The petitioner has resided on Edgewater Point for forty-five years. He purchased his properties and built his home on Edgewater Point because of its natural beauty on the waterfront and because of the restrictive covenants which petitioner expected would maintain Edgewater Point as a wholly residential community of owner occupied homes. For many years that expectation was realized. However, in recent years new property owners have come onto Edgewater Point who believe that the covenants do not apply to them.

The current disregard of the Edgewater Point restrictive covenants unfortunately reflects the self-interest of many of the new property owners who became wealthy during the recent period of corporate excesses and illegal financial schemes. They have bought into existing prestigious communities such as Edgewater Point as a confirmation of their heightened social status. Unfortunately along with the new wealth came an attitude that local rules and regulations were meant to apply to others. It is this new group of Edgewater Point property owners who have decided that the restrictive covenants are not binding and can be ignored.

The instant matter illustrates the problem faced by the petitioner due to the endemic non-compliance with the Edgewater Point restrictive covenants by new property owners. The respondents Fass are essentially real estate speculators. Following the purchase of their property the respondents became absentee landlords and have allowed the property to deteriorate while non-caring tenants occupied the house. The respondents' deteriorating property is an eyesore for the community and unfairly impacts on petitioner who suffers declining values for his own properties. The restrictive covenants, if enforced, would protect against this result.

Initially the petitioner sought to have the Edgewater Point restrictive covenants enforced against the respondents, and other recalcitrant property owners, by the Edgewater Point Property Owners Association ("EPPOA") without resorting to the courts. However, those efforts failed due in part to the growing number of property owners who have a vested interest in not having the covenants enforced. Many of the older residents on Edgewater Point do not have the fortitude to pursue the required litigation against the newer defiant property owners. Accordingly, it was left to the petitioner to commence the required litigation to have the restrictive covenants enforced.

Early in petitioner's litigation the State courts held that the petitioner is required to commence separate lawsuits against each of his neighbors to enforce the Edgewater Point restrictive covenants. For that reason the petitioner commenced separate lawsuits against three of his neighbors who were blatantly violating the restrictive covenants. The petitioner commenced the instant matter to obtain compliance with the restrictive covenant which provides that all houses on Edgewater Point be owner occupied and used solely for residential purposes. As stated in the covenant:

> The Grantee, by the acceptance of this deed does hereby covenant and agree with the Grantor as follows: 3. That no manufactory, trade or business whatsoever shall at any time hereafter be erected, maintained or permitted upon the premises hereby conveyed. The term "business" shall be deemed to prohibit the operation or maintenance of a school, hotel, or boarding or lodging house, and any owner, tenant or occupant of any portion of the property, who shall permit a paying guest to reside on the premises, or shall house or keep one or more guests for the purpose of making a money profit, shall be deemed to violate the provisions of this paragraph; but however, the restriction against paying guests shall not be deemed to include members of families related by blood or marriage who may jointly maintain a dwelling as a permanent residence.

Unfortunately, despite the plain language of this restrictive covenant, the Westchester County Supreme Court dismissed the petitioner's complaint without a finding of fact. According to the Court the petitioner's complaint failed to state a cause of action because under the interpretation of the covenant adopted by the Court property owners were only prohibited from operating hotels and boarding houses on Edgewater Point. The Court found that the restrictive covenant did not prohibit property owners from renting their houses to tenants for profit. (See Appendix D). This finding was directly contrary to the plain language of the covenant. The petitioner strongly believed that the Court's interpretation of the covenant was erroneous and that the decision was wrong.

Under New York State statute, Civil Practice Law and Rules (CPLR) §§ 5511 and 5512, every litigant has the right of one appeal from a judgment of the County Supreme

Court to the Appellate Division. Pursuant to such right, the petitioner timely filed an appeal with the Appellate Division, Second Department contesting the decision of the Westchester County Supreme Court.

The Second Department had twenty judges when the instant matter was appealed (the panel currently has twenty-one). Appeals are assigned to a panel of either four or five judges. There is no statute and there are no publicized rules which determine how a judge is selected to sit on a particular appellate panel or whether the panel should consist of four or five judges. The selection of the appellate panel and the number of judges sitting on a particular appeal is determined by an unknown process. Absent the required transparency, there can be no public faith in the selection process or that the judges selected will be impartial and fair.

The petitioner's appeal was assigned to a four member appellate panel. Two of the members of the panel, Justices Gabriel M. Krausman and Thomas A. Adams, had also appeared on the panels of the other appeals brought by petitioner under his own name concerning Edgewater Point. Thus, of the five appeals brought by petitioner to the Second Department over a two year period, all relating to Edgewater Point, Justices Krausman and Adams appeared together on four of the appellate panels hearing the appeals. It should be additionally noted as a corollary that eleven of the judges in the twenty member pool of judges in the Second Department never appeared on the appellate panels in any of the petitioner's five appeals.

The petitioner's four appeals wherein Justice Krausman and Adams appeared together included the instant matter and *Kaufman v Farris*, 293 AD2d 654, 740 NYS2d 627 (2nd Dept., 2002); *Kaufman v Village of Mamaroneck*, 286 AD2d 666, 729 NYS2d 778 (2nd Dept., 2002); and *Kaufman v Kehler, et al.*, 305 AD2d 636, 759 NYS2d 765 (2nd Dept., 2003). The fifth appeal wherein neither Justice Krausman nor

Justice Adams appeared on the panel was *Kaufman v Office of Building Inspector*, 295 AD2d 349, 743 NYS2d 880 (2nd Dept., 2002).

The probability of two judges, out of a pool of twenty, being randomly assigned to the four member appellate panels in four of five appeals brought by one individual is only 22 out of 1,000,000 or a statistically impossible .000022 % chance. It is clear that Justices Krausman and Adams were not randomly assigned to the appellate panels considering the petitioner's appeals.

The petitioner was originally alerted to the apparent bias of Judges Krausman and Adams during oral argument of his appeals. Both Justices Krausman and Adams were unnecessarily abusive towards the petitioner's attorney and derisive of the petitioner.

Further, $10,000 sanctions were improperly imposed against the petitioner in one of his appeals wherein Judges Krausman and Adams were again on the appellate panel. As explained more thoroughly below, there was no legal or factual basis for imposing the sanctions.

The petitioner lost all four appeals he brought in the Second Department, including the instant matter, wherein Justices Krausman and Adams appeared on the appellate panel. With respect to the instant matter the Second Department dismissed the petitioner's appeal stating:

> It is well settled that the law favors the free and unobstructed use of property [citations omitted]. Accordingly, a restrictive covenant must be strictly construed against those seeking to enforce it, and may not be given an interpretation extending beyond the clear meaning of its terms [citations omitted]. Moreover, where the language used in a restrictive covenant is equally capable of two interpretations, the interpretation which limits the restriction must be adopted [citations omitted]. Here,

> the subject covenant prohibits any "owner, tenant or occupant" of premises located in Edgewater Point from operating a boarding or lodging house for paying guests. However, the covenant does not expressly bar a property owner from leasing his or her home, and, in fact, contemplates the possibility that homes will be leased by barring both tenants and owners from using premises for business purposes. Since all of plaintiff's claims for damages and injunctive relief are predicated upon the theory that the restrictive covenant bars property owners from leasing their homes, the Supreme Court properly dismissed the complaint for failure to state a cause of action, and denied that branch of the plaintiffs' cross motion which sought summary judgment on the first and fifth causes of action set forth in the complaint.

See, *Kaufman v Fass*, 302 AD2d 497, 756 NYS2d 247 (2nd Dept., 2003) (See Appendix A).

Because the Second Department in its decision in the instant matter indicated that the restrictive covenant in issue was "equally capable of two interpretations" the petitioner requested reargument on the grounds that the Court had erred by adopting the wrong interpretation in a close case. The petitioner strongly believed that the covenant, when read as a whole and in the context of other Edgewater Point restrictive covenants, clearly prohibited all private property owners from having paying tenants on Edgewater Point. Nevertheless, the Second Department denied the petitioner's motion to reargue. (See Appendix B).

The petitioner exercised his right to request the highest court in the State of New York, the Court of Appeals, to accept an appeal of the decision of the Second Department. However, the Court of Appeals denied the petitioner's motion for leave to appeal without comment. (See Appendix C).

REASONS FOR GRANTING THE WRIT

The petitioner contends that the manner in which the appellate panels are constituted in the Second Department violates both the Equal Protection and Due Process clauses of the Constitution. The Second Department has promulgated no rules or regulations, and there is no applicable New York State statute which proscribes the manner of selecting the appellate panels. It is known that the selection process of the appellate panels *is not random* and that such process can be manipulated. The concealed process whereby appellate panels are selected in the Second Department violates the petitioner's Due Process right to a fair hearing before an impartial judiciary. Further, the petitioner has been singled out by the Second Department for special treatment by the non-random selection of special appellate panels to hear his appeals thereby violating his right to Equal Protection.

DUE PROCESS

The petitioner is aware that judges are human and that they will have natural prejudices and personal biases. The petitioner is also aware that the Constitution can not require that all appeals be considered by a new panel of judges never previously exposed to the appellants. However, the petitioner contends that at a minimum the Constitution requires that the process for selecting judges be fair and neutral to ensure that the judges selected be impartial. The petitioner also contends that the selection process must be transparent and be pursuant to a published set of rules so that the selection process cannot be manipulated to serve an improper bias or prejudice.

Obviously, random selection of judges in a transparent and neutral manner would satisfy the requirements of Constitutional Due Process. It is equally obvious, however, that the use of a concealed and non-random process which allows manipulation and abuse can not be Constitutional. See, e.g., *City of Cleburne, Texas, et al. v Cleburne Living Center,*

Inc., 473 U.S. 432, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985) and *Lindsey v Normet*, 405 U.S. 56, 31 L. Ed. 2d 36, 92 S. Ct. 862 (1972). As this Court stated in *In re Murchison*, 349 U.S. 133, 99 L. Ed. 942, 75 S. Ct. 623 (1955): "a fair trial in a fair tribunal is a basic requirement of due process" and "our system of law has always endeavored to prevent even the probability of unfairness."

Clearly the States are free to organize their courts and the Constitution does not require that States provide for an appeal. However, when a State does act and provides for an appeal as of right, as New York has done, it must proceed in accordance with the Due Process requirements of the Constitution, including the requirement of a fair and impartial judiciary. See, *Tumey v Ohio*, 273 U.S. 510, 71 L. Ed. 749, 47 S. Ct. 437 (1927); *Aetna Life Ins. Co. v Lavoie*, 475 U.S. 813, 89 L. Ed. 2d 823, 106 S. Ct. 1580 (1986); *Ward v Monroeville*, 409 U.S. 57, 34 L. Ed. 2d 267, 93 S. Ct. 80 (1972); *Johnson v Mississippi*, 403 U.S. 212, 29 L. Ed. 2d 423, 91 S. Ct. 1778 (1971); and *Bracy v Gramley*, 520 U.S. 899, 138 L. Ed. 2d 97, 117 S. Ct. 1793 (1997).

With respect to the selection of an appellate panel of four judges from a pool of twenty, as occurred in the instant matter, it is no less a Constitutional requirement that the selection procedure be pursuant to published rules and that the actual process of selecting the panel be both public and neutral. When, as in the instant matter, the selection process is not transparent and is subject to manipulation such that certain judges are allowed to maneuver onto appellate panels of their choosing, both the appearance and the reality of impartiality is lost. More importantly, the public faith in the judiciary will be lost because appellants appearing before the Court will never know if their case was decided on the merits or was subjected to improper influence. Losing appellants will be convinced, as petitioner is convinced, that the hearing was not fair.

In describing the minimum requirements necessary to comply with Due Process in a judicial proceeding this Court in *Goldberg v Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1970) stated:

> Finally, the decision maker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. *Ohio Bell Tel. Co. v. PUC,* 301 US 292 (1937); *United States v. Abilene & S.R. Co.,* 265 U.S. 274, 288-289 (1924). To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on, *cf. Wichita R. & Light Co. v. PUC,* 260 U.S. 48, 57-59 (1922), though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law. ***And, of course, an impartial decision maker is essential.*** *Cf. In re Murchison,* 349 U.S. 133 (1955); *Wong Yang Sung v. McGrath,* 339 U.S. 33, 45-46 (1950). [emphasis added]

See also, *Withrow v Larkin*, 421 U.S. 35, 43 L. Ed. 2d 712, 95 S. Ct. 1456 (1975).

More recently, in *Bracy v Gramley*, 520 U.S. 899, 138 L. Ed. 2d 97, 117 S. Ct. 1793 (1997) this Court reiterated that:

> the floor established by the Due Process Clause clearly requires a "fair trial in a fair tribunal," [citation omitted], before a judge with no actual bias against the defendant or interest in the outcome of his particular case.

Since the United States Constitution provides that every citizen is entitled to a "fair trial in a fair tribunal" then it is respectfully submitted that the petitioner's Constitutional right to Due Process has been violated. The concealed manner in which the appellate panel was selected to hear his appeal was inherently flawed so that it could not result in a fair

tribunal. The clear manipulation of the selection process of the appellate panel for petitioner's appeal resulted in biased judiciary.

As stated above, the same two judges appeared on the four member appellate panels in four of the petitioner's five appeals before the Second Department over the last two years. Justices Krausman and Adams appeared on four of the five appeals brought by the petitioner. The statistical probability of the same two judges, out of a pool of twenty, being randomly selected on four of five appeals brought by one individual are 22 out of 1,000,000 or a statistically impossible .000022 % probability. Thus, the manipulation of the selection process in the Second Department is well established.[1] There can also be no dispute that the process for selecting appellate panels in the Second Department is not transparent and is not done pursuant to any statute or publicized rules.

This Court has not determined the minimum procedural due process required by the Constitution with respect to judicial assignments. This Court has not held that the selection process must be random or neutral in order to satisfy the requirements of the Constitution. This court has also not held that the selection process must be open to the public. These are important issues which this Court should address. Whether the selection process involves an appellate panel, as in this matter, or the initial selection of the trial judge,

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[1] It should be also noted that a third justice, Justice Stephen Crane, appeared in three of the petitioner's five appeals, including the one appeal wherein Justices Krausman and Adams did not appear. And two justices, Nancy E. Smith and Cornelious J. O'Brien, each appeared in two of petitioner's five appeals. It is readily apparent that the repeated appearance of these three Justices, along with Justices Krausman and Adams, on the appellate panels considering the petitioner's five appeals was not random.

it is crucial that the selection process itself be completely neutral, open to the public, and pursuant to published rules to ensure a "fair trial in a fair tribunal."

The petitioner further contends that only an appellate panel selected transparently and randomly can be considered impartial for Constitutional purposes. Any deviation from a transparent and random selection of judges must be justified by a reason which is directly related to a valid State interest and which is neutral in its application to all citizens. As stated by this Court in *Marshall v Jerrico, Inc.*, 446 U.S. 238, 64 L. Ed. 2d 182, 100 S. Ct. 1610 (1980):

> ***The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases***. This requirement of neutrality in adjudicative proceedings safeguards the two equal concerns of due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process. See *Carey v. Piphus*, 435 U.S. 247, 259-262, 266-267 (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. See *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976). At the same time, it preserves both the appearance and the reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," *Joint Anti-Facists Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring), by ensuring that ***no person*** will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

> * * * **Indeed, "justice must satisfy the appearance of justice**," *Offutt v. United States*, 348 U.S. 133, 136 (1955). See also *Taylor v. Hayes*, 418 U.S. 488 (1974) [emphasis added]

Similarly, as stated by this Court in *Logan v Zimmerman Brush Co.*, 455 U.S. 422, 71 L. Ed. 2d 265, 102 S. Ct. 1148 (1982):

> As our decisions have emphasized time and again, the Due Process Clause grants the aggrieved party ***the opportunity to present his case and have its merits fairly judged***.
>
> * * *
>
> What the Fourteenth Amendment does require, however, "is 'an opportunity . . . granted at a meaningful time and in a meaningful manner,' *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (emphasis added), 'for [a] hearing appropriate to the nature of the case,' *Mullane v. Central Hanover Tr. Co., supra*, at 313." (*Boddie v. Connecticut*, 401 U.S., at 378. [emphasis added]

It is extremely important that the judiciary maintain both the reality and the appearance of impartiality and fairness and that the procedure by which judges are selected to hear a particular matter be open and neutral. A selection process which is not transparent, such as currently utilized by the Second Department, leads to the inescapable conclusion that the process is not fair and that judges will be selected for improper purposes. Concealed procedures for judicial assignment fail to meet the minimum requirements of due process required by the Constitution. Such procedures are obviously subject to abuse and manipulation giving the appearance that justice can be bought and sold. Any decision rendered under such opaque process will always be suspect.

It can be argued, of course, that a transparent and neutral selection process would not guarantee that the judges thereby selected would be impartial and fair. However, the petitioner is not contending that the Constitution requires that judges always be impartial, although that would be a worthy goal, but only that the deck can not be purposely stacked against one appellant by "State" action. Judges can not be allowed to repeatedly maneuver onto selected appellate panels to ensure that the result they want will prevail. If the selection process was transparent and random then judges would not have the opportunity to maneuver onto panels and appellants, like the petitioner, would have a reasonable opportunity to have a neutral and impartial appellate panel hearing his appeals.

A litigant or appellant can not easily prove bias or prejudice on the part of the judiciary. A prejudiced judge will not usually tip his or her hand. It is for this reason that the selection process of the appellate panels must always be transparent and random. For the public to maintain its faith in the judiciary the opportunity for manipulation of the panel selection must be eliminated.

The petitioner strongly believes, based upon the decision in the instant matter and by events and decisions in his related appeals before the Second Department, that the appellate panel hearing his appeals, and specifically Justices Krausman and Adams, had an improper prejudice against him and that he did not receive a fair hearing. The petitioner can not prove this bias directly but the obvious manipulation of the appellate panels hearing the petitioner's appeals provide direct proof that petitioner was not given a fair and impartial hearing.

As noted above, the petitioner has brought five appeals to the Second Department all involving the enforcement of local property regulations and covenants on Edgewater Point where he has his home. The five appeals brought by the petitioner over the last two years include the instant matter

and *Kaufman v Farris*, 293 AD2d 654, 740 NYS2d 627 (2nd Dept., 2002); *Kaufman v Village of Mamaroneck*, 286 AD2d 666, 729 NYS2d 778 (2nd Dept., 2002); and *Kaufman v Office of Building Inspector*, 295 AD2d 349, 743 NYS2d 880 (2nd Dept., 2002); and *Kaufman v Kehler, et al.*, 305 AD2d 636, 759 NYS2d 765 (2nd Dept., 2003). Justices Krausman and Adams appeared on the appellate panel in all petitioner's appeals except *Kaufman v Office of Building Inspector, supra*.

Not only did the petitioner find it improper that Justices Adams and Krausman appeared on four of his five appeals, but he became alarmed when during oral argument both judges were openly and adamantly abusive towards the petitioner's attorney who was not allowed to complete a sentence, let alone convey the merits of petitioner's appeal. The petitioner and his wife were in the audience when Justices Adams and Krausman improperly voiced animosity towards petitioner and repeatedly interrupted oral argument to harangue petitioner and his attorney. The Justices made it clear by their comments and gestures during oral argument that they had complete scorn for the petitioner and had improperly prejudged the merits of the appeals before them. See., e.g., *Federal Trade Commission v Texaco, Inc.*, 381 U.S. 739, 14 L. Ed. 2d 714, 85 S Ct. 1798 (1965).

The petitioner does not know the underlying source of the extremely hostile behavior and abusive comments of Justices Adams and Krausman. The instant matter clearly has merit and was appropriately before the Second Department on appeal based upon the single issue of contract interpretation. The petitioner's legal position was properly argued upon a logical interpretation of the restrictive covenant as requiring owner occupancy by private property owners on Edgewater Point. The respondents Fass did not dispute that they had rented their house to tenants for profit. All that was required was a resolution of the disputed interpretation of the covenant.

Certainly the underlying facts and simple legal issue involved in this case do not explain the abusive behavior of Justices Adams and Krausman. However, what happened next was even stranger.

In denying the petitioner's appeal in the instant matter, the Second Department relied upon recited rules of construction in finding that where a restrictive covenant was "equally capable of two interpretations" the least restrictive would be adopted. Thus, according to the Second Department in its decision dated February 18, 2003 in pertinent part:

> Moreover, where the language used in a restrictive covenant is equally capable of two interpretations, the interpretation which limits the restriction must be adopted [citations omitted]. Here, the subject covenant prohibits any "owner, tenant or occupant" of premises located in Edgewater Point from operating a boarding or lodging house for paying guests. However, the covenant does not expressly bar a property owner from leasing his or her home, and, in fact, contemplates the possibility that homes will be leased by barring both tenants and owners from using premises for business purposes.

See, *Kaufman v Fass*, 302 AD2d 497, 756 NYS2d 247 (2nd Dept., 2003) (See Appendix A). Significantly, there is no indication in the decision of the Second Department that the petitioner's appeal was either frivolous or without merit. Indeed the decision indicates that the covenant in issue was "equally capable of two interpretations."

The petitioner disagreed with the decision of the Second Department. The petitioner believes that the restrictive covenant in issue, when viewed objectively and in the context of the remaining Edgewater Point covenants, must be read as prohibiting all private property owners from having tenants. The language of the Second Department in its decision gave the petitioner reason to believe that the decision of the Court

was close and that in the Court's view the covenant in issue was "equally capable of two interpretations." Accordingly, the petitioner prudently and logically determined to move to reargue the decision on March 19, 2003.

Under New York statute, New York Civil Practice Law and Rules (CPLR) § 2221, the petitioner had the right to move to reargue a decision of the Second Department. Further, pursuant to CPLR § 5602, the petitioner had the right to request permission to proceed with an appeal to the highest court of the State, the New York Court of Appeals. In the event the Second Department denied either or both motions, the petitioner had the additional statutory right, under CPLR § 5602, to make a direct request to the New York Court of Appeals to accept an appeal. Based upon these statutory rights, which the petitioner fully intended and did in fact exercise, the initial decision of the Second Department in the instant matter was not final and binding as it was subject to future reversal by either the Second Department itself or by the Court of Appeals.

As noted above, the petitioner had another appeal before the Second Department also involving the correct interpretation of the Edgewater Point restrictive covenant at issue in the instant matter. The petitioner's appeal in *Kaufman v Kehler*, *supra*, was pending before the Second Department when its original decision in the instant matter was issued (on February 18, 2003). *Kehler* was originally scheduled to be argued on the same day as the instant matter. However, because of the death of one of the parties in *Kehler* one week before argument that appeal was postponed and eventually rescheduled by the Second Department for April 23, 2003 (when it was submitted without oral argument).

Immediately following the decision of the Second Department in the instant matter (*Fass*), the defendants in *Kehler* demanded that the petitioner withdraw that *(Kehler)* appeal. The petitioner notified the *Kehler* defendants that he had

elected to exercise his right to move to reargue in the instant matter (*Fass*) and that therefore the decision in that matter was not yet final. Moreover, the issues in the two appeals were not identical. Accordingly, it was prudent for the petitioner to continue with the *Kehler* appeal despite the decision in the instant matter (*Fass*).

When the petitioner refused to withdraw the appeal in *Kehler*, the defendants therein moved for sanctions before the Second Department on the basis that the petitioner's refusal to withdraw the pending appeal was frivolous conduct. The petitioner responded to the motion by informing the Second Department that he would not be withdrawing the *Kehler* appeal for the reasons explained to the *Kehler* defendants. The petitioner believed that the motion for sanctions would be immediately dismissed by the Second Department because the briefs in *Kehler* had been submitted seven months earlier, the decision in the instant matter (*Fass*) was not final, and the petitioner had the statutory right to at least one appellate review in every matter, including *Kehler* regardless of the decision in any other appeals.

As noted above, the appellate panel in *Kehler* consisted of the same four justices as in the instant matter, including Judges Adams and Krausman. As stated above, based upon the pending motion to reargue, and the petitioner's right to request the Court of Appeals to consider an appeal, the petitioner had very good and prudent reasons for not withdrawing his appeal in *Kehler* immediately following the decision in the instant matter (*Fass*). Nevertheless, in a revealing and troubling decision, the Second Department appellate panel imposed $10,000 sanctions against the petitioner solely for refusing to withdraw the *Kehler* appeal following the February 18, 2003 decision in the instant matter (*Fass*). According to the Court:

> ORDERED that the motion is granted to the extent that within 20 days after service upon him of a copy of this decision and order on motion, the appellant is directed to pay the sum of $10,000 to Cahill, Gordon & Reindel, the attorney for the respondents, representing the respondents' reasonable costs and attorney's fees incurred in defending this appeal * * * *
>
> In light of this court's prior holding in *Kaufman v Fass*, the instant appeal was without merit in law and could not be supported by a reasonable argument for an extension, modification, or reversal of existing law. The restrictive covenant was clearly just as inapplicable, if not more so, to mere occupants of a house in the community, who resided there rent-free, as it was to tenants who paid rent to occupy a house in the community. Accordingly, the conduct of the appellant in pursuing this appeal after the decision and order of this court in *Kaufman v Fass* constituted frivolous conduct within the meaning of 22 NYCRR 130-1.1.

The improper imposition of $10,000 sanctions against the petitioner by the same appellate panel as considered the petitioner's appeal in the instant matter, clearly establishes that panel's improper bias against the petitioner.[2] It is a bias which the petitioner has had to face in four separate appeals because of the repeated manipulation of appellate panel assignments in the Second Department. The repeated appearance of Justices Krausman and Adams on four of five appeals, and also on the unwarranted motion for sanctions, was purposeful and the decisions of the Second Department are tainted by its improper and opaque selection process.

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[2] The imposition of sanctions was pursuant to a separate proceeding instituted by Kehler and technically constitutes the fifth, of six, appellate proceeding wherein Judges Krausman and Adams appeared on the panel judging the merits of petitioner's arguments.

The petitioner recites the events in *Kehler* and the motion for sanctions solely to show that the justices on the Second Department appellate panels which decided both *Kehler* and the instant matter were neither impartial nor objective as required by the Constitution. This is the danger which will always arise where the selection process for judges is neither transparent nor neutral and is subject to manipulation.

EQUAL PROTECTION

The petitioner's right to Equal Protection was also violated by the New York Courts. As this Court stated in *City of Cleburne, Texas, et al. v Cleburne Living Center, Inc.*, 473 U.S. 432, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985):

> The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. *Plyler v. Doe,* 457 U.S. 202, 216 (1982). Section 5 of the Amendment empowers Congress to enforce this mandate, but absent controlling congressional direction, the courts have themselves devised standards for determining the validity of state legislation or other official action that is challenged as denying equal protection. The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. *Schweiker v Wilson,* 450 U.S. 221, 230 (1981); *United States Railroad Retirement Board v. Fritz,* 449 U.S. 166, 1740175 (1980); *Vance v. Bradley,* 440 U.S. 93, 97 (1979); *New Orleans v. Dukes,* 427 U.S. 297, 303 (1976). When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, *United States Railroad Retirement Board v. Fritz, supra,* at 174; *New Orleans v.*

> *Dukes, supra,* at 303, and the Constitution presumes that even important decisions will eventually be rectified by the democratic processes.

This Court has recently stated that discrimination of even a class of one can violate the Constitution. According to this Court in *Village of Willowbrook, et al., v Olech*, 528 U.S. 562, 145 L. Ed. 2d 1060, 120 S. Ct. 1073 (2000):

> Our cases have recognized successful equal protection claims brought by a "class of one," where plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. See *Sioux City Bridge Co. v. Dakota County,* 260 U.S. 441, 67 L. Ed. 340, 43 S. Ct. 190 (1923); *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.,* 488 U.S. 336, 102 L. Ed. 2d 688, 109 S. Ct. 633 (1989). In so doing, we have explained that "'the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.'" *Sioux City Bridge Co., supra,* at 445 (quoting *Sunday Lake Iron Co. v. Township of Wakefield,* 247 U.S. 350, 352, 62 L. Ed. 1154, 38 S. Ct. 495 (1918)).

Unlike most other litigants appearing before the Second Department, the petitioner was not provided with a randomly selected appellate panel. Instead, the panel assigned to the petitioner's appeal in the instant matter included two judges, Justices Adams and Krausman, who had also appeared on three of the petitioner's other recent appeals before that Court. Thus, as noted above, in four of five appeals brought by the petitioner before the Second Department over a two year period the four member appellate panels included Justices Adams and Krausman.

These facts demonstrate that the petitioner has been singled out for special treatment before the Second Department by having the same two judges repeatedly appear on the four member panels reviewing the petitioner's appeals, including the instant matter. No reasonable basis for treating the petitioner differently than all other appellants appearing before the Second Department can be provided. This is a blatant violation of the Equal Protection Clause of the Fourteenth Amendment.

The petitioner was also treated differently than other appellants appearing before the Second Department in that his appeal was heard by only a four member appellate panel. Other appellants in the Second Department have their appeals heard by a five member panel, and appellants in the First, Third and Fourth Departments (the Appellate Division in New York State is divided into four Departments) all have their appeals heard by five member panels.

It is improper to treat the petitioner differently than other appellants in the Second Department and in the State of New York by assigning only four judges to the appellate panel hearing the petitioner's appeal. The fifth judge may have been persuasive in petitioner's favor during deliberations. The petitioner is entitled to that fifth voice to the same extent as any other appellant in the State.

The New York State Constitution and statutes provide that where there is a four member appellate panel and there is an even split on the appeal then the matter is reheard with a fifth judge to break the tie. Such procedure does not remedy the Constitutional violation but exacerbates the unfairness. Judges sitting on four member panels are aware that if they dissent and an even split occurs the appeal will have to be reheard taking additional time and resources. Especially in a close case, as in the instant matter, institutional pressure may well be exerted on the judges not to dissent. Where, as in the instant matter, two judges are allowed to maneuver onto the

appellate panel and ardently advocate a particular decision, it is unlikely that the two remaining panel members will feel strongly enough about the case to dissent when to do so would require a rehearing. Two rogue judges can have a lesser impact when the appeal is heard by a five member appellate panel.

There is no logical or rational basis for having four member appellate panels for some litigants when other appellants have five member appellate panels assigned to their appeals.

The Constitution does not prohibit all disparate treatment of individuals by a State but it does require that such treatment be justified on some non-arbitrary basis reasonably related to a legitimate interest of the State. As stated by Justice Blackmun in his concurring opinion in *Logan v Zimmerman Brush Co.*, 455 U.S. 422, 71 L. Ed. 2d 265, 102 S. Ct. 1148 (1982):

> For over a century, the Court has engaged in a continuing and occasionally almost metaphysical effort to identify the precise nature of the Equal Protection Clause's guarantees. At the minimum level, however, the Court "consistently has required that legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives." *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981). This is not a difficult standard for a State to meet when it is attempting to act sensibly and in good faith. But the "rational-basis standard is 'not a toothless one, '" id., at 234, quoting *Mathews v. Lucas*, 427 U.S. 495, 510 (1976); the classificatory scheme must "rationally advanc[e] a reasonable and identifiable governmental objective." *Schweiker v. Wilson*, 450 U.S., at 235. I see no need to explore the outer bounds of this test, for I find that the Illinois statute runs afoul of the lowest level of permissible equal protection scrutiny.
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> * * *

> . . . But it is not enough, under the Equal Protection Clause, to say that the legislature sought to terminate certain claims and succeeded in doing so, for that is "a mere tautological recognition of the fact that [the legislature] did what it intended to do." *U.S. Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 180 (1980 (STEVENS, J., concurring in judgment). ***This Court still has an obligation to view the classificatory system, in an effort to determine whether the disparate treatment accorded the affected classes is arbitrary.*** *Rinaldi v. Yeager*, 384 U.S., at 308 ("The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes"). Cf. *U.S. Railroad Retirement Bd. v. Fritz*, 449 U.S., at 178. [455 U.S. 422, 442]
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> * * *
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> The State's rationale must be something more than the exercise of a strained imagination; while the connection between means and ends need not be precise, it, at the least, must have some objective basis.[emphasis added]

It is extremely doubtful that any non-arbitrary basis can be given for treating the petitioner differently from other appellants appearing before the Second Department. Even if the concealed process for selecting four member appellate panels in the Second Department could survive a challenge *vis a vis* the Due Process Clause, then it must certainly fail under Equal Protection analysis. There is no conceivable rational basis for singling out the petitioner for special treatment before the Second Department.

CONCLUSION

The petitioner has been denied his Constitutional rights to Due Process and Equal Protection. The vehicle for the Constitutional violation is a court system which allows judges to pick and choose which cases they will hear. Judges on the Second Department bench who have a bias or particular interest in an appeal can help ensure the result by placing themselves on the appellate panel hearing that appeal. The petitioner has directly suffered the consequences of such improper conduct in four of his appeals brought to that Court wherein he was denied an impartial appellate panel randomly selected. The same two judges, from a pool of twenty, maneuvered to appear in petitioner's four appeals proving that the selection of the appellate panels was neither random nor neutral. As a result the petitioner was denied his Constitutional right to a fair hearing before an impartial court. Based upon the Constitutional violations it is respectfully requested that this Court grant a writ of certiorari for the consideration of the important issues raised in this matter.

Respectfully submitted,

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